

IT-09-92-T
D42620 - D42616
15 AUGUST 2012

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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-09-92-T
Date: 15 August 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 15 August 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION TO ADMIT THE
EVIDENCE OF WITNESS RM-115 PURSUANT TO RULE 92
*TER***

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY

1. On 11 May 2012, the Prosecution filed a motion pursuant to Rule 92 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules") with regard to Witness RM-115 ("Motion").¹ The Defence responded on 29 May 2012 ("Response").² On 5 June 2012, the Prosecution filed a request for leave to reply and for an extension of time to reply to the Response, which the Chamber granted on 8 June 2012 through an informal communication.³ The Prosecution filed a reply to the Response on 20 July 2012 ("Reply").⁴

II. SUBMISSIONS OF THE PARTIES

2. The Prosecution seeks leave to tender the witness's ICTY Witness Statement dated 4 November 2008 ("2008 Statement") and an addendum to that statement dated 22 April 2010 ("2010 Addendum") (collectively, "the Statements") together with two associated exhibits, pursuant to Rule 92 *ter* of the Rules.⁵ The Prosecution submits that the Statements are brief and limited to one incident, making presentation through Rule 92 *ter* of the Rules ideal.⁶ With regard to the 2010 Addendum, it notes that although it had sought to deviate from the Chamber's Guidance on Presentation and Tendering of Evidence ("Chamber's Guidance") in its Motion, the Chamber accepted the admission of a supplemental statement dealing with specific issues or corrections to the original statement in the Additional Clarification and Amendment of the Guidance on the Tendering and Presentation of Evidence of 9 July 2012 ("Additional Guidance").⁷ The Prosecution argues that the 2010 Addendum only contains corrections to the B/C/S version of the 2008 Statement and therefore can be tendered pursuant to Rule 92 *ter* of the Rules.⁸ As for the associated exhibits, the Prosecution argues that they are integral and associated with the 2008 Statement.⁹ In addition, the Prosecution requests to have 45 instead of 30 minutes available for examination-in-chief.¹⁰

¹ Prosecution 92 *ter* Motion: RM115, 11 May 2012.

² Defence Response to Prosecution Rule 92 *ter* Motion: RM115, 29 May 2012.

³ Prosecution Request for an Extension of Time to File a Reply to Defence Response to Prosecution Rule 92 *ter* Motion: RM115, 5 June 2012.

⁴ Prosecution Reply to Defence Response to Prosecution Rule 92 *ter* Motion: RM115, 20 July 2012.

⁵ Motion, para. 1.

⁶ Reply, paras 6-7.

⁷ Reply, para. 3.

⁸ *Ibid.*

⁹ Motion, para. 13.

¹⁰ Motion, paras 14-15.

3. The Defence opposes the Motion, insofar as it is non-compliant with the Chamber's Guidance and misrepresents the facts proffered in the Statements.¹¹ The Defence contends that the corrections in the 2010 Addendum are not clear or understandable, suggesting that the witness changed her recollection of what she had heard Mr Mladić order, and that there is therefore insufficient ground for exception to deviate from the Chamber's Guidance by tendering two statements ("First Objection").¹² With regard to the associated exhibits, the Defence argues that the 2008 Statement does not sufficiently identify the document bearing Rule 65 *ter* no. 09965.1 and does not refer to the one bearing Rule 65 *ter* no. 09965 at all ("Second Objection").¹³ The Defence also asserts that due to the significance of the evidence, in that the witness stated that she had heard Mr Mladic giving an order to attack which resulted in her injuries, the witness's evidence should be led *viva voce* ("Third Objection").¹⁴ Lastly, the Defence does not object to the Prosecution's requested extra time, but asks that the time for cross-examination be equally increased to accommodate the added material expected to be led.¹⁵

III. APPLICABLE LAW

4. Rule 92 *ter* of the Rules provides in relevant part that a Trial Chamber may admit the evidence of a witness in the form of a written statement under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement accurately reflects that witness's declaration and what the witness would say if examined.

IV. DISCUSSION

5. As for its general approach to Rule 92 *ter* motions, the Chamber refers to and incorporates the reasoning in its Decision with Regard to Prosecution Motion for Admission into Evidence of Witness Harland's Statement and Associated Documents of 3 July 2012 ("Harland Decision").¹⁶

6. In relation to the First Objection, the Chamber refers to the Additional Guidance which addresses the Defence's objection regarding the tendering of a supplemental statement.¹⁷ With regard to the Defence's objection on the clarity of the corrections, the Chamber considers that the Defence will have an opportunity to address any ambiguities during cross-examination.

¹¹ Response, para. 3.

¹² Response, paras 7-10.

¹³ Response, para. 12.

¹⁴ Response, paras 14-17.

¹⁵ Response, para. 4.

¹⁶ Harland Decision, paras. 5-10.

¹⁷ T. 527.

7. In relation to the Second Objection, the Chamber notes that the Prosecution may decide to tender the two exhibits during its examination-in-chief, having heard the Defence's position and the Chamber's preference as expressed in the Chamber's Guidance and the Additional Guidance.¹⁸ The Chamber therefore will not decide upon admission of the exhibits at this stage.

8. In relation to the Third Objection, the Chamber recognises that the significance of the proffered evidence may be a factor militating against admission under Rule 92 *ter* of the Rules.¹⁹ Nonetheless, as the Chamber has considered in its earlier decisions, it will only very exceptionally disallow a party from using Rule 92 *ter* of the Rules.²⁰ The witness's 2008 Statement contains a reference to hearing a public radio broadcast of Mr Mladic giving instructions.²¹ Further, the Chamber has understood from the Motion that the Prosecution also plans on tendering the recordings and the transcript of the radio message discussed in the 2008 Statement.²² For the foregoing reasons, the Chamber does not consider the witness's evidence of such significance that it should be led *viva voce* in order to avoid undue prejudice to the Accused.

9. Lastly, in relation to the Prosecution's request for an additional 15 minutes of time for examination-in-chief, the Chamber reiterates that in its Rule 73 bis (C) decision of 24 April 2012, it already accepted that the examination of Rule 92 *ter* witnesses may take longer than 30 minutes when the additional time is used to tender relevant exhibits with the witness.²³ Considering that at this stage the Chamber does not know how many exhibits the Prosecution will tender, nor is aware of any other specific reason to increase the time for examination-in-chief, it defers its decision on the specific time allotted.²⁴ With regard to the Defence's request for an equally increased time for cross-examination, the Chamber reiterates that the exact amount of time which will be available depends on many factors and may also be re-evaluated depending on how the cross-examination develops.²⁵ As such, the Chamber will not decide on the specific time allotted for cross-examination at this stage.

¹⁸ T. 107-108, 530.

¹⁹ Harland Decision, para. 10.

²⁰ *Ibid.*

²¹ 2008 Statement, p. 2.

²² Motion, Annex A.

²³ T. 313-315.

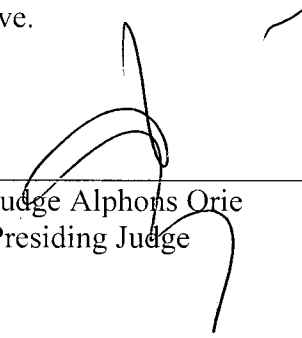
²⁴ The Chamber has taken notice of the witness's physical trauma's and will take any discomfort this may cause into account when deciding upon a new request from the Prosecution for additional time for examination-in-chief.

²⁵ Harland Decision, para. 11.

V. DISPOSITION

10. For the foregoing reasons, the Chamber **DEFERS** its decision on the Motion

Done in English and in French, the English version being authoritative.



Judge Alphons Orie
Presiding Judge

Dated this Fifteenth of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]